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December 10, 1998

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TWA325
Washington, D.C. 20554

Re: RM Docket No. 98-201

Dear Ms. Salas:

Transmitted herewith, on behalf of the North Carolina Association of Broadcasters and the Virginia Association of Broadcasters, are an original and eleven (11) copies of ***Comments of the North Carolina Association of Broadcasters and the Virginia Association of Broadcasters*** in the above referenced proceeding.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

Mark J. Prak
Counsel to the North Carolina Association of Broadcasters and the Virginia Association of Broadcasters

MJP/atd

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Satellite Delivery of Network Signals	)	
to Unserved Households for	)	
Purposes of the Satellite Home	)	CS Docket No. 98-201
Viewer Act	)	RM No. 9335
	)	RM No. 9345
Part 73 Definition and Measurement	)	
of Signals of Grade B Intensity	)	
	)	
To: The Commission	)	

JOINT COMMENTS OF THE
NORTH CAROLINA AND VIRGINIA ASSOCIATIONS
OF BROADCASTERS

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December 11, 1998

Summary

The Satellite Home Viewer Act is a copyright statute. It is not a part of the Communications Act of 1934, as amended. It is thus clear that the FCC has no power to interpret, enforce, preempt or modify the SHVA. The Act was not designed to promote competition between satellite providers and cable television operators. The SHVA was adopted for two -- and only two -- purposes. First, the law was intended to enable households located beyond the reach of a local network affiliate to obtain access to broadcast network programming by satellite. Given the fact that only a tiny fraction of citizens live outside the Grade B service area of affiliates of the networks, the universe of households eligible to receive service under the SHVA is quite small. Indeed, it was estimated by the satellite operators, at the time the SHVA was adopted, to be less than a million households located in rural areas. Given the satellite industry's current subscriber counts and their documented history of flagrantly violating the law, it is also apparent that local television stations are being damaged by the satellite providers' conduct. The second plainly stated Congressional purpose underlying the SHVA is the preservation of the existing free, over-the-air national network/local affiliate distribution system.

The Associations urge the Commission to regard with skepticism all proposals that would have a tendency to reduce the service areas of local broadcasters. Local stations loss of viewers, as a result of the importation of duplicative satellite programming, will directly translate into:

- loss of advertising revenue;
- inefficiencies in the local advertising market;
- inefficiencies in the program supply and distribution markets, including a decrease in the diversity of programming;

- a breakdown of the network/affiliate symbiosis; and
- inability of local broadcasters to cultivate a distinctive image.

Moreover, if local broadcasters are unable to reach viewers who are tuned to duplicative network programming, then certain vitally important aspects of the public interest obligations of local broadcasters will be compromised, including:

- the dissemination of local news and weather;
- the effective functioning of the Emergency Alert System;
- community outreach through programming responsive to local concerns and needs;
- communication of political debate and commentary on issues of local concern, as well as political advertising for local and state-wide elections; and
- broadcast of public service announcements of local charities, schools, and community service organizations, including local telethons, school closings, and food and blood drives.

In addition, shrinking of local markets will ultimately:

- undermine the social desirability of having many, diverse, local outlets instead of a few regional or national outlets; and
- breakdown the logic of the Commission's analog and digital allotment schemes.

Neilsen Media Research data regarding audience viewing patterns makes clear that the lawless activities of satellite providers have already resulted in a significant diversion of network audience away from local affiliates. In certain Virginia markets, Nielsen estimates the actual audience diversion for network programs from affiliates to satellite providers to be as high as 18%!

The "free lunch" proposals advanced by the satellite interests would harm competition in local television markets and in the program supply marketplace; they would harm local communities

by restricting the reach of the EAS system, PSA's, local news and public affairs programming; and they strain common sense since they involve a blatant attempt--by businesses that have been judicially determined to have flouted the law--to make an end-run around the law. In short, the proposals advanced by satellite interests flunk the test of competition, communities and common sense.

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JOINT COMMENTS OF THE
NORTH CAROLINA AND VIRGINIA ASSOCIATIONS
OF BROADCASTERS

The North Carolina Association of Broadcasters ("NCAB") and the Virginia Association of Broadcasters ("VAB") (collectively, the "Associations"), by their attorneys, hereby submit the following comments in response to the *Notice of Proposed Rule Making* ("*Notice*"), FCC 98-302, released November 17, 1998 in the above-captioned proceeding. NCAB is a non-profit trade association consisting of some 150 radio and television stations located throughout the State of North Carolina. VAB is a non-profit trade association consisting of some 129 radio and television stations located throughout the Commonwealth of Virginia. The *Notice* requests comment on issues related to whether, and in what circumstances, a household is "unserved" by local, network-affiliated television stations within the meaning of the Satellite Home Viewer Act ("SHVA" or "Act") and thus eligible to receive distant network-affiliated television stations by satellite.

The Associations concur with the joint comments filed in this proceeding by the ABC, CBS, Fox and NBC Television Network Affiliate Associations. Many of NCAB and VAB's television members are also members of those trade associations. The Associations write separately here to emphasize the peculiar harm to the bedrock policy of localism, imbedded in Section 307(b) of the Communications Act, which would flow from the Commission's acquiescence to the demands of satellite interests for special regulatory treatment.

Introduction

There can be no question but that the Satellite Home Viewer Act is a copyright statute.[1] It is not a part of the Communications Act of 1934, as amended. It is thus clear that the FCC has no power to interpret, enforce, preempt or modify the SHVA.[2] The Act was not designed to promote competition between satellite providers and cable television operators.[3] The SHVA was adopted for two -- and only two -- purposes. First, the law was intended to enable households located beyond the reach of a local network affiliate to obtain access to broadcast network programming by satellite. Given the fact that only a tiny fraction of citizens live outside the Grade B service area of affiliates of the networks, the universe of households eligible to receive service under the SHVA is quite small. Indeed, it was estimated by the satellite operators, at the time the SHVA was adopted, to be

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[1] 17 U.S.C. § 119.

[2] *See* Joint Comments of ABC, CBS, Fox and NBC Television Network Affiliate Associations at pp. __ to ___.

[3] *Id.* at ___.

less than a million households located in rural areas.[4] Given the satellite industry's current subscriber counts and their documented history of flagrantly violating the law, it is also apparent that local television stations are being damaged by the satellite providers' conduct. Which brings us to the second plainly stated Congressional purpose underlying the SHVA: the preservation of the existing free, over-the-air national network/local affiliate distribution system.

This Commission has indicated that it believes in localism. The Chairman has set forth a three-part aspirational test for policy decisions consisting of (1) competition, (2) communities, and (3) common sense. The Associations respectfully submit that a fair analysis of these policy touchstones leads inescapably to the conclusion that the Commission should reject the proposals advanced by the satellite interests.

Other commentors will focus more extensively on the Commission's lack of authority to adopt the proposals advanced by the satellite industry. NCAB and VAB will instead address the impact implementation of such proposed changes would have on the television stations and communities in local markets. It is to those issues that we now turn.

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[4] Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, *Report*, FCC 87-62, 62 Rad. Reg. 2d (P&F) 687 (1987), ¶ 198. The following year, summarizing data collected by the industry, the Commission stated that "the consensus appears to be that 800,000 households to 1 million households are in [white] areas" and note that "[t]his is roughly equivalent to one percent of television households." Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, *Report and Order*, FCC 88-67, 64 Rad. Reg. 2d (P&F) 910 (1988), ¶ 64 n. 41.

I.

The Proposals Advanced by the Satellite Industry Should Be Rejected Because They Would Undercut the Efforts of Congress and the Commission to Promote a Nationwide, Free, Over-the-Air Television Broadcast System That is Responsive to Local Needs and Interests

Localism is the foundation of the free over-the-air television system. Local news, weather, sports, public affairs and other programming are an essential component of the service provided by local television stations. In times of crisis, emergency information is delivered to the public by local television and radio stations. During election campaigns, local television broadcasters are a key vehicle used by political candidates to communicate with voters. The focus on localism, as the key component of our nation's communications policy, was no accident. The emphasis on localism in our communications policy continues to be due to conscious policy choices made by Congress and the Commission in the years since 1934. Localism is a value that our nation has not, and indeed cannot ever, outgrow or abandon. From a jurisprudential standpoint, the localism concept in communications law is akin to the value that federalism plays in our constitutional scheme of government. Each concept allows peculiarly local concerns to be addressed within the context of a unified national system. This Commission has determined to replicate the value of localism in transitioning to digital television. Broadcasters are now spending millions of dollars to replicate their existing NTSC Grade B service to the public with a new, improved DTV Grade B service.

What is the point of creating a local television system, whether NTSC or digital, if the Commission is going to sanction unlawful behavior by satellite operators which has the effect of undercutting the very system Congress, the Commission, and the industry have striven to create? There is no right or entitlement for every citizen to receive every program service via all video

delivery mechanisms now known or hereafter developed. Nor would such a policy necessarily be a sound one. The reason the copyright law exists is to promote the creation of unique works of authorship.[5] The limited monopoly that is copyright actually spurs the creation of more intellectual property.

The Associations urge the Commission to regard with skepticism all proposals that would have a tendency to reduce the service areas of local broadcasters. Local stations loss of viewers, as a result of the importation of duplicative satellite programming, will directly translate into:

- loss of advertising revenue;
- inefficiencies in the local advertising market;
- inefficiencies in the program supply and distribution markets, including a decrease in the diversity of programming;
- a breakdown of the network/affiliate symbiosis; and
- inability of local broadcasters to cultivate a distinctive image.

Moreover, if local broadcasters are unable to reach viewers who are tuned to duplicative network programming, then certain vitally important aspects of the public interest obligations of local broadcasters will be compromised, including:

- the dissemination of local news and weather;
- the effective functioning of the Emergency Alert System;
- community outreach through programming responsive to local concerns and needs;

---

[5] The purpose of the Copyright Clause of the Constitution is "to promote the Progress of Science and Useful Arts by securing for limited times to Authors and Inventors the exclusive right to their respective Writings and Discoveries." U.S. Const. Art. 1, Section 8, Clause 8.

- communication of political debate and commentary on issues of local concern, as well as political advertising for local and state-wide elections; and

- broadcast of public service announcements of local charities, schools, and community service organizations, including local telethons, school closings, and food and blood drives.

In addition, shrinking of local markets will ultimately:

- undermine the social desirability of having many, diverse, local outlets instead of a few regional or national outlets; and

- breakdown the logic of the Commission's analog and digital allotment schemes.

This is no mere speculative matter. The lawless activities of satellite providers are already resulting in a significant diversion of network audience away from local affiliates. For example, Nielsen reports that, in the following Virginia markets, satellite diversion of network viewing has reached significant proportions.

DMA Market	Raw # of Diaries Reporting Receipt of Network Service By Satellite	Percentage of Diaries Receiving Network Service By Satellite
Roanoke	111	18.08
Richmond	111	12.2
Tri-Cities	99	13.1
Norfolk	39	5.41
Harrisonburg	49	18.15
Charlottesville	49	15.51

Source: Nielsen Media Research, July 1998 survey period; data provided by VAB Member WDBJ(TV), Roanoke

If one accepts the Nielsen methodology as statistically valid, then some 18% of television households in the Roanoke DMA are receiving their network service by satellite. To be sure, in a market with mountainous terrain such as Roanoke, some of these households may well be

"unserved" within the meaning of the SHVA: but certainly not 18%! If this Commission's budget were to be cut 18%, or even 5% by Congress, would it affect the Commission's efforts to carry out its regulatory mission? The real world effect of the 5% illegal satellite network service subscribers in a market such as Norfolk, with reflectively flat terrain, is that: (1) for the local television station, advertising rates drop because of the smaller audience; (2) for the local political candidate, his or her advertisement or appearance on the local station's news or public affairs show (or station-sponsored debate) will be seen by 5% fewer local residents; (3) activations of the EAS system will be seen by 5% fewer local residents; and (4) the broadcast of local PSA's, school closing information, charity telethons and other local information will be seen by 5% fewer local residents. If the Commission truly believes in localism and, indeed, is exhorting broadcasters to do more local public service in the digital age, how can it possibly ignore such adverse, real world consequences?

At the end of the day, the Commission should recall that nothing in the SHVA, or the Commission's regulations, prevents satellite carriers from obtaining copyright licenses in the open market, just as the networks and affiliates do. The SHVA's compulsory license merely permits them, within very narrow limits, to avoid the real-world arena of competition.

To the extent that the Commission has authority to act, its actions must be consistent with the goals and purposes of the SHVA. As the Commission recognizes in the *Notice*:

> The network station compulsory licenses created by the Satellite Home Viewer Act are limited because Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public interest by making available to local citizens information of interest to the local community (e.g., local news, information on local weather, and information on community events).

> Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast networks, might be jeopardized, thus undermining one important source of local information.[6]

The importance of the network/affiliate relationship and localism to the preservation of our nation's free, over-the-air broadcasting service cannot be gainsaid. The Associations submit that these fundamental concerns must frame whatever action the Commission takes in this proceeding, even though the scope of the Commission's authority is limited.

A. Protecting the Network/Affiliate Relationship and Promoting Localism Were Key Legislative Concerns in Adopting the SHVA

In passing the SHVA, Congress was clear that it intended the Act to "respect[] the network/affiliate relationship and promote[] localism."[7] In the Committee Reports, Congress stated repeatedly its desire to protect the network/affiliate distribution system[8] and to prevent disruption to the special exclusivity arrangements between networks and their affiliates.[9] The Act's legislative history makes plain Congress's appreciation of the historical and contemporary importance of the

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[6] *Id.* at ¶ 3; *see also id.* at ¶ 15 (stating that "we recognize the important role that local broadcast stations play in their communities"); *id.* at ¶ 36 ("We acknowledge and reiterate Congress' decision in the SHVA to protect network-affiliate relationships and to foster localism in broadcasting. . . . [L]ocalism is central to our policies governing broadcasting and the obligation of broadcasters to serve the public interest.").

[7] H.R. Rep. No. 100-887, pt. 1, at 14 (1988).

[8] *See id.* at 8; H.R. Rep. No. 100-887, pt. 2, at 19-20 (1988).

[9] *See* H.R. Rep. No. 100-887, pt. 1, at 15 (1988); H.R. Rep. No. 100-887, pt. 2, at 20 (1988). *See also Copyright Office Report* at 104 ("The legislative history of the 1988 Satellite Home Viewer Act is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection.")

network/affiliate relationship and localism to the successful provision of free, over-the-air television to the American people:

> The television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typic[a]lly the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast; produces local news and other programs of special interest to its local audience, and creates an overall program schedule containing network, local and syndicated programming.
>
> The Committee believes that historically and currently the network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well.[10]
>
> * * *
>
> Free local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely. The Committee is concerned that retransmissions of broadcast television programming to home earth stations could violate the exclusive program contracts that have been purchased by local television stations. Depriving local stations of the ability to enforce their program contracts could cause an erosion of

[10] H.R. Rep. No. 100-887, pt. 2, at 20 (1988).

> audiences for such local stations because their programming would no longer be unique and distinctive.[11]

Notwithstanding the lack of the Commission's authority to modify its administrative or technical rules with regards to the Act, a number of the proposals contained in the *Notice*, including redefining the meaning of Grade B signal intensity and revising the Commission's Grade B rules, are at odds with the principles underlying the Act. The Commission should not act, even in an advisory capacity to Congress, in any manner that would jeopardize the fundamental nature of the nation's free, local television broadcasting service. Modifying the Grade B rules to increase, even slightly, the composition of the narrow class of unserved households will undermine the economic viability of local broadcasting by altering the settled expectancies of market participants, especially local advertisers.

B. The Supreme Court Has Acknowledged the Vital Importance of Free, Over-the-Air Television to Our National Discourse

Congress has not been alone in recognizing the significance of the network/affiliate relationship and the principle of localism in broadcasting. The Supreme Court has engaged in its own extensive analysis, of the importance of localism.

As the Court acknowledged in the two *Turner* must-carry cases,

> In the Communications Act of 1934, Congress created a system of free broadcast service and directed that communications facilities be licensed across the country in a "fair, efficient, and equitable" manner. Congress designed this system of allocation to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern. As we recognized in [*United States v.*] *Southwestern Cable*, [392 U.S.

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[11] *Id.* at 26.

> 157 (1968),] the *importance of local broadcasting outlets "can scarcely be exaggerated*, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population."[12]

The development of direct-to-home satellite does not alter the Court's fundamental conclusion:

> The interest in maintaining the local broadcasting structure does not evaporate simply because cable [and satellite] ha[ve] come upon the scene. Although cable and other technologies have ushered in alternatives to broadcast television, [more than 30] percent of American households still rely on broadcast stations as their exclusive source of television programming. And as we said in *Capital Cities Cable, Inc. v. Crisp*, [467 U.S. 691 (1984),] "protecting noncable [and non-satellite] households from loss of regular television broadcasting service due to competition from cable [and satellite] systems" is an important federal interest."[13]

Although the *Turner* cases deal with a very different subject, much of the Court's analyses of the principle of localism in broadcasting stands independently and provides instructive guidance in the current proceeding. In enacting cable must-carry, Congress acted, in part, on the recognition of the connection between "the advertising revenue base which sustains free local broadcast television" and "the economic viability of free local broadcast television and its ability to originate quality local programming."[14] That connection is every bit as critical when it comes to reducing the audience size, and hence a local station's advertising revenue base, due to importation of distant

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[12] *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 663 (1994) ("*Turner I*") (emphasis added) (citations omitted); *see also Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 137 L. Ed. 2d 369, 388 (1997) ("*Turner II*").

[13] *Turner I*, 512 U.S. at 663.

[14] *Id.* at 634.

network signals by satellite, especially when expectancies with regard to intellectual property rights are in issue.[15] As the Court put it in *Turner II*:

> Simply put, a television station's audience size directly translates into revenue—large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station cannot serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat.[16]

Indeed, what is ultimately at issue is the preservation of free television programming to the more than 30 percent of Americans without cable or satellite.[17] Local broadcast television, "a vital part of the Nation's communication system,"[18] which, "though it is but one of many means for communication, [has been] by tradition and use for decades now . . . an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression,"[19] must be protected "because 'there is a substantial governmental interest in promoting the continued

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[15] In fact, the Register of Copyrights has stated that "the Copyright Office believes that importation of distant network signals creates a greater potential for harm for broadcasters and copyright owners in the satellite context than it does in the cable context." *Copyright Office Report* at 118.

[16] *Turner II*, 137 L. Ed. 2d at 399 (quoting favorably the explanation of a broadcast industry executive) (citation omitted). The economics are the same if the reduction in audience size results from a siphoning off of viewers to a distant network signal, delivered via satellite, of the same network as a substitute for local network service.

[17] *Cf. Turner I*, 512 U.S. at 646.

[18] *Id.*

[19] *Turner II*, 137 L. Ed. 2d at 391.

availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.'"[20]

The court noted that it is difficult to see that any "legitimate legislative goals would be satisfied by the preservation of a rump broadcasting industry providing a minimum of broadcast service" to those Americans without cable or satellite.[21] Instead, the *Turner II* Court recognized "a specific interest in ensuring the continuation of local origination of broadcast programming."[22] In any event, "[i]t is for Congress," not the Commission, "to decide how much local broadcast television should be preserved."[23]

Congress' intentions and findings concerning the importance of the network/affiliate relationship and the principle of localism should be given deference by this agency since the SHVA "involv[es] congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change."[24] In the SHVA, Congress has already made a specific judgment about where the line must be drawn by balancing, on the one hand, the grant of a compulsory copyright license in derogation of the normal exclusive rights of copyright owners and, on the other, the preservation of localism and network/affiliate relationships. That line relied upon the definition of "unserved household," which, in turn, rested on a long-standing, settled formulation of Grade B intensity. Tinkering with

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[20] *Turner I*, 512 U.S. at 646 (citations omitted).

[21] *Turner II*, 137 L. Ed. 2d at 389.

[22] *Id.* at 390 (internal quotation marks and citation omitted).

[23] *Id.*

[24] *Id.* at 392.

the congressionally-drawn line is not only beyond the Commission's purview, but would also upset an inherently complex regulatory scheme, as well as interfere in congressional assessments about the relationship between the broadcast and satellite industries, both of which are undergoing rapid economic and technological change.

Satellite delivery of distant network signals (indeed, of any programming) is plainly a luxury, not a necessity. As the Commission is well aware, satellite subscribers tend to be affluent folks with significant disposable income. The *Turner* make clear teach the importance of free, over-the-air local broadcasting to our national discourse and common culture, especially to those unable to afford subscription services. The Associations implore the Commission not to rush to "protect" affluent consumers who may lose satellite delivery of distant network signals, as a result of a court injunction enforcing the copyright laws against satellite carriers that blatantly ignored the law and engaged in illegal behavior,[25] while forgetting the one third of Americans who either cannot afford, or choose not, to subscribe to a luxury service—because it will be these Americans who will actually be harmed by the withering of free, local broadcast service.

C. The Commission Has Repeatedly Placed a High Value On Localism and Should Do So When Evaluating SHVA Issues

The Commission, too, has repeatedly recognized the critical significance of localism to the success of the American television broadcasting service, as well as the role that the network/affiliate

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[25] The Associations remind the Commission that the court-ordered injunction in *CBS v. PrimeTime 24* will only result in the termination of *distant* network service to those who are *illegally* receiving it. Those subscribers who, in fact, cannot receive a measured signal of Grade B intensity will continue to be lawfully eligible to receive distant network service via satellite, just as they have always been. Obviously, those subscribers who *can* receive a measured signal of Grade B intensity already receive *local* network service.

relationship plays in that success. More than 30 years ago, in the infancy of cable, the Commission already expressed its concern that the new technology could seriously harm the predicate of free, over-the-air television service. From its inception, the nation's commercial television system has been based upon "the distribution of programs to the public through a multiplicity of local station outlets."[26] Indeed, the original NTSC Table of Allotments itself, as well as the new DTV Table of Allotments now, "is predicated upon the social desirability of having a large number of local outlets with diversity of control over disseminating sources rather than a few stations serving vast areas and populations."[27] Having east and west coast feeds of just a few distant network stations delivered by satellite within local stations' natural markets tears at the heart of the Commission's allotment schemes. Local stations, unlike distant stations, afford a unique "means for community self-expression. They provide programming designed to meet the particular tastes and needs of the public in their service areas, such as local news and public affairs, and are accountable to the Commission for operations in the public interest."[28] Distant stations provide no local news and public affairs programming of any relevance to those outside their own local markets. By their very nature, they cannot do so since they are not a part of, and connected to, the distant communities. Distant stations are not a forum for local community self-expression, and they cannot provide information vital to the local community, including broadcasts of the Emergency Alert System;

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[26] Restrictions on Use of Microwave Relay Facilities to Carry Television Signals to Community Antenna Television Systems, *First Report and Order*, FCC 65-335, 4 Rad. Reg. 2d (P & F) 1725 (1965), at ¶ 47.

[27] *Id.* at ¶ 46.

[28] *Id.* at ¶ 45.

political debate, commentary, and advertising of central importance to local or even state-wide campaigns; and public service announcements of local charities, schools, and community service organizations.

Although the Associations believe that the Commission is without jurisdiction to act in this rule making, to the extent the Commission does act, then its statutory duties require it to step in and prevent the risk that satellite "competition will destroy or seriously degrade the service offered by a television broadcaster,"[29] not the other way around. This is so because the competition involved between local broadcasters and satellite providers "is not between basically similar entities, which offer similar benefits to the public. On the contrary, if [satellite] operations should drive out television broadcasting service, the public as a whole would lose far more—in free . . . local service with local control and selection of programs—than it would gain."[30] Indeed, the Commission would be untrue to its responsibility if it failed to ensure the preservation of its regulatory scheme for local television. As the Commission noted when it first considered the harm flowing from the importation of the signals of distant television stations into local markets more than 30 years ago, it need not wait

> "until the bodies pile up" before conceding that a problem exists. Our duty is "to encourage the larger and more effective use of radio in the public interest"—to ensure that all the people of the United States have the maximum feasible opportunity to enjoy the benefits of broadcasting service. To accomplish this goal, we must plan in advance of foreseeable events, instead of waiting to react to them.[31]

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[29] *Id.* at ¶ 48.

[30] *Id.*

[31] *Id.*

The past illegal activities of the satellite companies make clear the consequences that will follow from acquiescing in the satellite companies' desires to compete unlawfully in local television markets. The theft of broadcasters' intellectual property rights through violation of the SHVA has already resulted in a significant loss of viewers for local broadcasters. In North Carolina and Virginia, "the bodies are already beginning to pile up" as a result of the loss of viewers to unlawful duplicative network satellite service. This is not to say that, by acting to protect localism, the Commission would in any way ignore or denigrate the very real contribution which satellite service can make to the public interest. Such action would, instead, acknowledge, just as it did in the cable context, that satellite "serves the public interest when it acts as a *supplement* rather than a *substitute* for off-the-air television service."[32]

The uneven competitive landscape puts a local station—in effect, a single-channel video programming distributor—at a serious disadvantage in a multi-channel video programming distribution world. The Commission's early competitive analysis of the cable/broadcasting dichotomy remains remarkably apt in this new context: Thus the competition between satellite providers and local broadcasting stations is "marked by at least two features that are not present in the ordinary competition between broadcasting stations."[33] First, the satellite company, in providing service within a local station's natural market, carries duplicative network signals of distant stations but does not carry

> the signals of the local station which the subscriber is otherwise able to receive. . . . A gain of a subscriber to the [satellite] system will in

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[32] *Id.* (emphases added).

[33] *Id.* at ¶ 51.

> most cases mean the effective loss of a potential viewer for the local station. This kind of barrier to competitive access is not created in the course of competition between television broadcasting stations.[34]

The second feature that distinguishes competition between satellite companies and broadcasters turns on the ability of satellite companies rely upon a compulsory copyright license:

> [I]n subjecting the local station to competition from additional program services, the [satellite provider] does not [fully] enter the market for programming, as would a competing broadcaster. . . . The station obtains the right to exhibit network programs by offering to the network attractive audience circulation, etc., and by giving up to the network a major portion of the compensation which the sponsor or participating advertiser pays for the use of the station's facilities in connection with that program.[35]

By contrast, satellite providers utilize the SHVA's compulsory license, at below-market rates until very recently, and now, as two federal courts have determined, far beyond that license's actual scope. The result is that the exclusive rights negotiated in the program supply market have had their currency devalued:

> In dealing with program suppliers, stations usually obtain the exclusive right to exhibit programs within a particular geographical area and for a particular length of time. This exclusivity reflects, among other things, the judgment that duplication of the program within the station's market—either simultaneously or within some period of time—reduces the audience and value of the program to the station.
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> . . . The [satellite company] that provides its subscribers with the signals of distant stations presently stands outside the program distribution process [just] described. . . . It does not compete for network affiliation, nor for access to [certain] syndicated programs, feature films or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs

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[34] *Id.*

[35] *Id.* at ¶ 52.

> nor with bargaining with program suppliers for time and territorial exclusivity.
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> This is not the usual competitive situation. The [satellite company] and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The [satellite] operator need not enter this market at all.[36]

The satellite companies therefore operate from a vastly superior position, but it is not one fairly obtained in an open, competitive marketplace. This copyright advantage, especially when pressed beyond its narrow scope as it has been, will ultimately destroy or degrade the viability of local television service, and with it the foundation for local community service and self-expression.

As important as the preservation of localism is to a free, over-the-air television service, local affiliates, in turn, rely heavily on the symbiosis of the network/affiliate relationship. The Commission has long recognized the importance of the network/affiliate relationship and the efficiencies of the exclusive distribution system of the major networks:

> This longstanding arrangement enhances the value to affiliates of network programming and provides affiliates with incentives to promote that programming locally. In the absence of an exclusive distribution system, these incentives are attenuated because other distributors that did not share the cost of promotion would nevertheless benefit from it. In turn, prosperous affiliates benefit the network by providing popular local programming. Such programming not only enhances the network's reputation, but, via delivery of large "lead in" audiences for network programming, it increases network audiences and revenues.[37]

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[36] *Id.* at ¶¶ 53-55.

[37] Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, *Report*, FCC 87-62, 62 Rad. Reg. 2d (P & F) 687 (1987), at ¶ 159.

While the network provides the advantages of program production and the sale of advertising on a national scale, the affiliate is far more than just an outlet for the network's programming -- it provides local news, weather, public affairs programming, public service announcements, and other programming to create the total program schedule. The network-affiliate relationship is a true partnership serving the interest of both partners and the public interest by combining efficiencies. Exclusivity is an essential element of the mix, increasing the affiliate's resources and initiative to support and promote the network in competition against both other broadcast networks and other nationally-distributed services.[38]

In fact, a network feed has never been intended as a freestanding program service; rather, it is only part of the local station's total schedule. Nevertheless, it is a significant part -- and a part usurped by the duplicative programming of essentially a distant network feed into the local station's market by the satellite providers. As conceived by the partners to the relationship, local stations do not merely "retail" the wholesale programming supply of networks. Instead, both the programming and the payment flow from the network to the affiliate, as well as the entire bundle of rights acquired by the network, is fundamentally premised on a free, over-the-air system of broadcasting that does not contemplate the retail sale of those rights to the public.[39]

Satellite viewing of distant network signals in local markets perverts the entire system of free, over-the-air broadcasting that has developed over the decades. By intruding into local markets, which the SHVA specifically attempted to prevent, such satellite viewing, in effect, causes the

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[38] *See id.*

[39] *See id.* at ¶ 160.

network to compete directly with the affiliate for audience, thereby upsetting the symbiotic relationship and harming local revenues. As the Commission has already acknowledged:

> The network-affiliate relationship plays an important role in supplying the public with television service. This system of distribution, which is based on program rights ownership and copyright protection, a system of exclusive broadcast outlets, and contractual relationships among the parties, is totally by-passed through the direct-to-home satellite distribution mechanism . . . which involves no contractual or consensual arrangement of any type with either the program owners, the networks, or the broadcast stations whose signal is used.[40]

The *limits* of the special compulsory license granted to satellite carriers must be respected. It is a narrow license applicable only to unserved households, that is those households **not** able to receive the same programming from a local network affiliate. Those limitations were crafted to respect the network/affiliate relationship and to prevent disruption to the special exclusivity arrangements between networks and their affiliates. When the Commission re-introduced programming exclusivity in the cable and broadcasting industries in 1988, it developed an analytical framework that remains quite salient in this new context of satellite carriers and local television stations.

The Commission's framework began by recognizing that, under conditions that would otherwise be competitive, "a regulatory framework that limits the ability of some competitors to compete on the same terms as other competitors introduces a bias into the market process. With this bias, success in the marketplace becomes an artifact of regulation rather than an indicator that the successful competitor is meeting consumer demands efficiently."[41] There are multiple biases in the

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[40] *Id.* at ¶ 201.

[41] Program Exclusivity in the Cable and Broadcast Industries, *Report and Order*, FCC 88-180, 64 Rad. Reg. 2d (P & F) 1818 (1988), at ¶ 4.

satellite/broadcasting context that corrupt the efficiencies of market processes: public interest obligations of broadcasters not matched by those for satellite carriers, a below-market compulsory license for satellite carriers, and statutory limitations on the geographical scope of that compulsory license honored only in the breach. When considering these biases and the public interests at stake, the Commission should conclude, just as it had done with respect to cable, that satellite importation of distant signals to duplicate local broadcasting stations' programming amounts to an unfair method of competition.[42] Thus, the Commission should aim, to extent it acts at all, to level the competitive playing field. By preserving the limits of the SHVA compulsory license as enacted, the Commission will not deprive any satellite subscriber of his or her programs, but will instead "preserve to local stations the credit to which they are entitled -- in the eyes of the advertisers and the public -- *for presenting programs for which they had bargained and paid* in the competitive program market."[43]

When satellite carriers retransmit distant network signals into the local service areas of affiliates they divert the local broadcaster's audience. Such "[d]iversion imposes economic harm on local broadcasters that is the result of inequitable competitive rules rather than an inability to provide good service responsive to viewers' wishes. A drop of even a single rating point may represent a loss of one-third to one-half of a broadcaster's potential audience."[44] When local viewers are thus diverted from their local stations to distant stations, "the ability of local advertisers as a

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[42] *Cf. id.* at ¶ 9.

[43] *Id.* (emphasis in original) (quoting Restrictions on Use of Microwave Relay Facilities to Carry Television Signals to Community Antenna Television Systems, *First Report and Order*, FCC 65-335, 38 FCC 683, 715, 4 Rad. Reg. 2d (P & F) 1725 (1965)).

[44] *Id.* at ¶ 41.

group to make the best use of all available advertising media is reduced."[45] As discussed above, the audience diversion has already reached levels as high as 18% in some of the markets of the Associations' members.

Just as importantly, essential characteristics of programming exclusivity, negotiated in the marketplace, are perverted when satellite providers exceed the scope of their limited compulsory license. The result is that real exclusivity becomes an illusion. Take away even a little bit of the exclusivity of a product, and the product is no longer exclusive at all. "Ultimately, and in a variety of ways," it is the television viewer himself whose options are reduced and who "suffers as a result of the absence of exclusivity."[46]

In order for television programming to be produced, especially in a mix reflective of all viewers' tastes, "program producers and distributors must be compensated in such a way that they will have incentives to produce the amount and types of programming that viewers desire."[47] The SHVA's compulsory license scheme already interferes with the marketplace's compensation mechanism; any change in the expectancies concerning exclusive rights for intellectual property will disrupt the market even further. Infringing upon the exclusivity rights of networks and affiliates beyond the limited terms of the SHVA's narrow license, therefore, will hurt the supply of programs and will unfairly handicap competition to meet viewers' preferences in the distribution of existing programming.[48]

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[45] *Id.* at ¶ 50.

[46] *Id.*

[47] *Id.* at ¶ 54.

[48] *Cf. id.* at ¶ 55.

Thus, just as the Commission cautioned in the cable context, there is a real danger in viewers being

> diverted from the broadcasters with whom the program suppliers have contracted for exhibition. The revenues earned by the producer of a program depend upon the advertising revenue the broadcaster of the program is able to garner on the basis of the program's attractiveness to viewers. Duplication of programming through [satellite] retransmission of distant signals breaks this link between the attractiveness of the program to viewers and the amount the program producer gets paid. When a [satellite] operator in market B retransmits the signal of a broadcast in distant market A, the total audience for the program may even grow, because there will be some new viewers to supplement the audience that has simply been diverted from local broadcaster B. . . . [But] this growth will not, however, translate into greater revenues for the program producer; it will be more likely to result in reduced revenues. . . . This reduction in revenues will occur because the loss of audience by broadcaster B will reduce the amount it is profitably able to pay for the program, while at the same time, advertisers in distant market A will attach little importance to the newly-attracted viewers in local market B. The result is too small an increase in revenues from distant broadcaster A to offset the loss of revenue from local broadcaster B. Thus, program suppliers face reduced incentives to expand and improve the supply of programming . . . .[49]

The harm from improper intrusion into exclusivity is widespread, affecting program suppliers and local advertisers. Ultimately, however, the local broadcaster is harmed the most. Even apart from its direct effect on station revenues and the ability to obtain programming, negotiated exclusivity rights are valuable to broadcasters by allowing them to create a distinctive public image, which helps them to attract local viewers. For example, the ability of a local NBC affiliate to acquire a reputation as the only source of certain valued types of programming, such as "Friends," "Frasier,"

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[49] *Id.* at ¶¶ 58-59.

and "E.R.," serves to alert viewers to the general attractiveness of the broadcaster's whole range of programming selections.[50]

Although satellite operators pay compulsory license fees when they carry distant signals, these fees bear essentially no direct relationship to the value of the specific programs carried on distant signals. Satellite operators are thus permitted to take advantage of a twisted incentive system that does nothing but harm free, over-the-air local broadcasting. The Commission's conclusion in the directly analogous cable context is fully applicable here:

> [D]istant stations will be carried as long as their value to the [satellite operator] exceeds the compulsory license fee, even if the value of these distant signals to viewers is less than the value of the alternative programs that [satellite operators] would carry if broadcasters could exercise exclusive rights, so that [satellite operators] would have to negotiate to obtain the right to show duplicative programming.[51]

The logic of the Commission's prior analysis leads inexorably to the view that the Commission cannot ignore its duty to preserve the nation's system of local broadcasting, a system the Commission has worked so hard to create and administer. Again, the Commission's precedent provides an instructive guide:

> Our country has made a substantial investment in free, local, over-the-air service that has and continues substantially to promote the public interest. From a regulatory standpoint, broadcasters are governed by unique regulatory mechanisms that are designed to ensure they will serve their communities of license. In short, the Communications Act and our regulations have held broadcasters to a standard of operating in the public interest, convenience and necessity, with obligations to serve their local communities. . . . In fulfilling our responsibility . . . , we believe the public interest

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[50] *See id.* at ¶ 61.

[51] *Id.* at ¶ 69.

> requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows local broadcasters to compete fully and fairly with other marketplace participants. Promoting fair competition between free, over-the-air broadcasting and [satellite] helps ensure that local communities will be presented with the most attractive and diverse programming possible. Local broadcast signals make a significant contribution to this diverse mix. . . . [Alterations to] exclusivity protection [will] distort[] the local television market to the detriment of the viewing public especially those who do not subscribe to cable [and satellite]. Our regulatory scheme should not be structured so as to impair a local broadcaster's ability to compete, thereby hindering its ability to serve its community of license.[52]

In short, it is simply not desirable from a policy standpoint, as the Commission itself has acknowledged, "to undermine the basic network-affiliate relationship" to resolve "white area" issues concerning satellite duplication of network signals.[53]

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[52] *Id.* at ¶¶ 73-74.

[53] *Id.* at ¶ 119.

II.

Conclusion

As has been demonstrated above, the "free lunch" proposals advanced by the satellite interests would harm competition in local television markets and in the program supply marketplace; they would harm local communities by restricting the reach of the EAS system, PSA's, local news and public affairs programming; and they strain common sense since they involve a blatant attempt--by businesses that have been judicially determined to have flouted the law--to make an end-run around the law. In short, the proposals advanced by satellite interests flunk the test of competition, communities and common sense.

Respectfully submitted,

By _____

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